IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SERGIO DE LA CRUZ,

Petitioner,

v.

P.D. BRAZELTON, Warden,

Respondent.

No. C 13-01442 BLF (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING AS MOOT REQUEST FOR APPOINTMENT OF COUNSEL; DENYING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer addressing the merits of the petition and Petitioner filed a traverse. Having reviewed the briefs and the underlying record, the Court concludes that Petitioner is not entitled to relief based on the claim presented and denies the petition.

PROCEDURAL HISTORY

On August 12, 2010, a jury in Monterey County Superior Court found Petitioner

[1]This matter was reassigned to this Court on April 17, 2014.

guilty of first degree murder and kidnapping.[2] The jury also found true a special-circumstances allegation (murder while engaged in a kidnapping) for purposes of a life-without-parole sentence; and a firearm-use-causing-death allegation for purposes of a consecutive 25-years-to-life sentence enhancement. On September 14, 2010, the trial court sentenced Petitioner to state prison for a term of life without possibility of parole, with a stayed concurrent term totaling 33 years to life (eight years for kidnapping and the consecutive 25-years-to-life sentence enhancement).

Petitioner appealed to the California Court of Appeal, which affirmed the conviction and judgment in a reasoned judgment on May 8, 2012. (Answer, Ex. 7 *hereinafter* "Op.".) On August 22, 2012, the California Supreme Court summarily denied a petition for direct review. (Answer, Ex. 9.) On April 1, 2013, Petitioner filed the instant federal habeas petition.

BACKGROUND[3]

> Defendants were lovers. Their cell phone text messages outline a plot to kidnap and kill Andrade's husband, Jose Zarate. The plot came to fruition one morning when Andrade drugged Zarate. Andrade then took her children to school while leaving the front door open. Delacruz arrived at the home with an accomplice, hit Zarate, tied him up, wrapped him in a blanket, and put him in the trunk of Zarate's car. He took Zarate's gun from the home and drove his car to a remote vineyard. He opened the trunk and shot Zarate in the forehead. Both defendants separately confessed to Detective Alfred Martinez when confronted with their text messages.
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> The People's theories were that Delacruz was guilty of first degree murder and kidnapping as the perpetrator and Andrade was guilty of first degree murder and kidnapping as an accomplice.

(Op. at 2.)

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[2]Petitioner was tried with co-defendant Marisela Andrade. The jury found Andrade guilty of first degree murder and kidnapping and also found true a special-circumstances allegation (murder while engaged in a kidnapping) for purposes of a life-without-parole sentence.

[3]The facts of this case are taken from the California Court of Appeal opinion in *People v. Delacruz*, No. H036122 (Cal. Ct. App. May 8, 2012). (Answer Ex. 7.)

DISCUSSION

A. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 384–86 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412–13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's

application of clearly established federal law was "objectively unreasonable." *Id.* at 409. The federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state court decision to which Section 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091–92 (9th Cir. 2005). When there is no reasoned opinion from the highest state court considering a petitioner's claims, the court "looks through" to the last reasoned opinion. *See Ylst*, 501 U.S. at 804. The denial of review by the California Supreme Court was a summary denial. (Answer Ex. 9.) Thus, the last reasoned opinion is the California Court of Appeal's opinion on direct review. (Answer Ex. 7.)

The Supreme Court has vigorously and repeatedly affirmed that under AEDPA, there is a heightened level of deference a federal habeas court must give to state court decisions. *See Hardy v. Cross*, 132 S. Ct. 490, 491 (2011) (per curiam); *Harrington v. Richter*, 562 U.S. 86, 103–04 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam). As the Court explained: "[o]n federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Felkner*, 131 S. Ct. at 1307 (citation omitted). With these principles in mind regarding the standard and limited scope of review in which this Court may engage in federal habeas proceedings, the Court addresses Petitioner's claim.

B. **Legal Claim and Analysis**

Petitioner raises one ground for federal habeas relief: The totality of the circumstances rendered Petitioner's waiver of his *Miranda* rights involuntary and therefore violated his due process rights under the Fourteenth Amendment of the federal

Constitution.[4] (Pet. at 4–9[5] and Traverse at 3–5.) Specifically, Petitioner argues that his will was overborne by the following circumstances: Plaintiff suffered from a serious kidney condition that made him desperate for a bathroom break; being handcuffed to a chair for 15 hours; the detective engaging Petitioner in a lengthy conversation prior to giving the *Miranda* warning; and the detective's promises of leniency if Petitioner told the truth. The Court of Appeal provided the following additional relevant background:

> Police placed Delacruz in an interview room at 2:43 a.m. and handcuffed him. Detective Martinez entered the room at 5:40 p.m. and unlocked the handcuffs. He told Delacruz that he was investigating a case and wanted to see what Delacruz could tell him. The two talked about Delacruz having a health problem with his kidneys. Detective Martinez then asked Delacruz personal and family background questions. He thereafter informed

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[4]In Petitioner's traverse, Petitioner also argues that his confession was involuntary. The Court declines to address this argument for the following reasons.

First, the voluntariness of a confession is a separate legal issue from the voluntariness of a *Miranda* waiver. A confession can be found involuntary even if there is a valid *Miranda* waiver. *See, e.g., Miller v. Fenton*, 474 U.S. 104 (1985) (confession obtained after an hour of deceptive questioning may not have been voluntary even though validity of the defendant's prior *Miranda* waiver was conceded). In addition, voluntariness of a confession is not a factual issue entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Instead, it is a legal question meriting independent consideration in a federal habeas corpus proceeding. *Miller*, 474 U.S. at 115; *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991) (federal court not bound by state court finding that confession is voluntary). In contrast, a state court's decision regarding the voluntariness of a *Miranda* waiver is entitled to deference on federal habeas review under 28 U.S.C. § 2254(d). *See Hernandez v. Holland*, 750 F.3d 843, 852–53, 855 (9th Cir. 2014) ("the question is whether the California Court of Appeal was 'objectively unreasonable' when it found that the conversation between the [defendant and the detective] did not amount to an 'interrogation' under federal Supreme Court precedent."); *see also Collazo*, 940 F.2d at 415 n.4 (noting that the Supreme had not decided the question of whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a waiver.).

Second, nothing in this record suggests that Petitioner's claim that his confession was involuntary is exhausted. Petitioner did not present this claim to the California Supreme Court (*see* Answer Ex. 8). Accordingly, the Court may not consider whether Petitioner's confession was voluntary. *See* 28 U.S.C. § 2254(b), ©; *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982) (requiring federal habeas petitioners to exhaust all claims); and *Gulbrandson v. Ryan*, 738 F.3d 975, 993 (9th Cir. 2013) (a petitioner does not exhaust all possible claims stemming from a common set of facts merely by raising one specific claim).

[5] Citations to pages in the parties' filings will be to the page numbers applied by the Court's electronic docketing system, which are found at the top of each page, and not to the page numbers assigned by the parties or found at the bottom of the page.

Delacruz that he had two rules for his interviews: one, that "we're talking as men. We're adults and I respect you, you respect me ... and that respect comes from telling the truth.... We don't li—, we don't lie. If it's, if it's something that ... I tell everyone that I talk to, if, if there's something they don't want to say, or ... it's better to say, 'I don't want to say' ... than to try and make something up, or ... I mean, or just make up a story. It's ... if we're men, we're talking here as men and men only tell the, only the truth"; and two, that "when here in this room ... my special room, uh, only truth comes out of here.... And there's no reason to, to say anything else other than the truth.... Because I'm telling you, my job, uh ... my job is, is to talk to people and understand what they've gone through, what they're going through, and document that information in a report.... I'm not here as a judge ... I'm not here to judge anyone ... and, and I say that because I'm not a perfect person.... Uh, and I like to tell people that I'm not a perfect person so that they know that I'm not, I'm not sitting here, feeling superior ... or that I'm better than the other person because I'm not, I know I'm not. OK?" Detective Martinez continued that he made mistakes when he was young and could therefore see that most of the people he talked to were good people regardless of what crime was involved. He added that people found themselves in situations because of forces that influenced them and mistakes. He posed that "the good thing about mistakes is that we have the opportunity to repent of the things that we do." He said that his job was to write down what people told him because lawyers and judges do not have the opportunity to talk and learn that the person in court is "really not a very bad person." He offered that "the circumstances they found themselves in, out of necessity, uh, sometimes we're blinded by things, in what we're doing ... and we don't think about things, there are other things that influence us, other people who influence us, and sometimes we don't have control over that." He added "That's why I do everything possible to, in my reports, to put everything in that people can tell me ... uh, about their circumstances and why they are, they found themselves in the position that they were in ... in my report.... And that way, the ones who read those reports later, uh, they can uh, have a, a better uh, understanding of that person, of the personality ... and it's not just someone who is being accused of something." He repeated that "we all make mistakes in one way or another" and related that he gets upset if he finds out that one of his children made a mistake without the child telling him first but, if before he finds out, the child admits to a mistake "the punishment that you receive as a kid like that, it's always less." He continued that "And I'm telling you this because people, like I told you, people in, in the justice system ... the judges, the lawyers who read those reports, they're also human.... And if I can't help them understand ... the feelings, the reasons for someone who found himself in that position ... they can only see what's in black and white.... That's the crime, that was what happened. But if they can see, that's the crime, but this person ... feels, feels regret, thinking about it now, says, 'Mmm, I made a mistake, I was influenced by something, I was blinded by one thing or another,' then they also, being human ... react differently." He offered "That's why I say, the truth is always better.... The truth makes us free.... Ok? If we don't tell the truth, we're captives.... It's as if we formed a chain.... Every lie that we tell, everything that ... uh, mistake, and those are all mistakes ... that we all make, but we form our chain. Ok? ... The truth will help us to get out of that chain and, and shake that chain off.... It unties it. Uh, the same way, another example would be not ... and you have, you have dug holes before, right? ... You have made holes in the ground.... If you start making a hole in the ground and you're

> not careful about mak—, you're not ... you make it so deep ... you get to a point when it's so deep, and you haven't paid attention ... there's no way to get out.... That's what we do when we try to not tell the truth.... We dig that hole ... that hole gets really deep, we can't get out.... And there's no wa—, and if ... the only way that we can ... we can help ourselves get out is that someone else ... gives us a hand, gives us a, a rope, gives us a ladder, and that comes through cooperation.... Ok? Cooperation comes through people telling the truth.... Instead of lying. Uh, that's why I'm telling you, it's very important.... Very important because the case that we're going to talk about here is a very important case.... Uh, but I have to have understanding. Uh, the case that I'm investigating ... uh, I'm investigating the death of a, of a man.... Ok? And through my investigation ... I've talked to people in this case ... this man's wife ... and with other family members.... And through these people I have found out that they weren't so faithful.... Ok? And you[r] name has come up ... about that, as having a relationship ... with those people. The case, when ... any time that I have a case, uh, it's like I suspect the whole world.... Because without knowing, without knowing ... I suspect the whole world.... What we do as investigators is try to look for all the ways, all, all the possible connections there are ... because sometimes, through talking to people, we can get a small clue or ... here and there.... It's as if we were doing a puzzle on this, on this table.... And they're ... we know that puzzles have small pieces ... and if we're missing a piece ... the picture never looks good.... That's why we talk to every possible person.... Through my interviews I have found out that, that, uh, uh ... well, that you know a lady named Marisela.... She happens to be the wife of the man ... that, that ... someone killed.... And I knew, I have noticed that she wasn't, she wasn't faithful.... He wasn't either, but she wasn't faithful to, to her husband.... And I have to see the different possibilities.... Ok? That's why I wanted to talk to you today." Detective Martinez then advised Delacruz of his Miranda rights, Delacruz waived his rights and agreed to speak with Detective Martinez, and Delacruz implicated himself in the murder.

(Op. at 3–6.)

The California Court of Appeal found that there was no evidence that the manner in which Detective Martinez engaged in small talk overbore Petitioner's free will and also found that Petitioner's waiver of his *Miranda* rights was knowing and voluntary:

> In overruling Delacruz's objection to the admission in evidence of the interview with Detective Martinez, the trial court explained as follows: "I read very carefully from Page 1 through 47 because that is when the pre-Miranda discussion occurred, as well as the actual advisement of rights, which started on about Page 44 and went through 47 before they were concluded. [¶] In addition, I read—and then thereafter, I was reading parts of the interviews to get some context on the post-Miranda part of the interview, as well as the pre-Miranda. [¶] I have also read *People versus Honeycutt,* 20 Cal.3d, 150, a California Supreme Court case. I do believe the cases are different in their factual settings and circumstances. [¶] And the questions and responses from Pages 1 through 43 would be estimated to be over a period of 20 minutes approximately. [¶] They tell where the defendant was born, his cell phone, phone contact, emergency information, his work, his family, and the defendant started talking about an accident having been injured on

the job at one point in time. [¶] There is also a conversation from the detective about what he is looking for as the truth, not judging people and commenting about having people make mistakes and better to be open and truthful about it before he gets into the Miranda Rights. [¶] However, I still view the interview and the waiver of the Miranda Rights were involuntary [sic] submitted notwithstanding the pre-Miranda discussion going on. [¶] There were no questions that would be eliciting a confession that I saw in any pre-Miranda interview. [¶] So I do find that the Miranda Rights were voluntar[ily] and intelligently waived by the defendant during the course of this interview. That objection is overruled."

Delacruz relies on *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), and reiterates his challenge to the admission of the interview. He argues that his waiver of his *Miranda* rights was involuntary because the waiver resulted from a softening-up through disparagement of the victim and ingratiating conversation. He offers that Detective "Martinez engaged [him] in a lengthy conversation prior to giving the *Miranda* advisements," which "covered a wide range of topics" such as his kidney pain, occupation, and family. He continues that Detective Martinez then "exhorted [him] to tell the truth" and suggested that he "would be treated more leniently if he told the truth." He additionally asserts that Detective Martinez denigrated the victim by "telling [him] he had learned the man who was killed had been unfaithful." He further urges that he spent 15 hours handcuffed in the interview room before Detective Martinez advised him of his *Miranda* rights. According to defendant, "The combination of an extended period of incommunicado incarceration while in handcuffs, disparagement of the victim, softening-up of the suspect by ingratiating conversation and the suggestion of more lenient treatment if he 'told the truth' combined to render his waiver of rights involuntary." We disagree with Delacruz.

Any waiver of *Miranda* rights must be voluntary, knowing, and intelligent. (*Miranda*, *supra*, 384 U.S. at p. 444.) "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals ... the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The state must demonstrate the validity of the waiver by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

"'When reviewing a trial court's decision on a motion that a statement was collected in violation of the defendant's rights under *Miranda*, [citation], we defer to the trial court's resolution of disputed facts including the credibility of witnesses, if that resolution is supported by substantial evidence. [Citation.] Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda*'s rules.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 601.) Contrary to defendant's argument, *Honeycutt* does not compel exclusion of his interview. The defendant in *Honeycutt* was arrested and placed in a patrol car without *Miranda* admonitions. The defendant refused to talk until he realized he was acquainted with the detective transporting him to the station. At the station, the defendant was hostile to a second detective, who left the room, and the first detective then engaged the defendant in a half-hour unrecorded conversation about past events, former acquaintances, and the victim. The detective "mentioned that the victim had been a suspect in a homicide case and was thought to have homosexual tendencies." (*Honeycutt*, *supra*, 20 Cal.3d at p. 158.) At the

end of the half-hour, the defendant "indicated he would talk about the homicide." (*Ibid.*) He then was read his rights, waived them, and confessed. Based on these facts, the court concluded that "[w]hen the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id.* at pp. 160–161.)

Honeycutt does not stand for the general proposition that every prewarning conversation vitiates a subsequent knowing and voluntary waiver. (*See People v. Patterson* (1979) 88 Cal.App.3d 742, 751.) Rather, "*Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose." (*Ibid.*)

In this case, there was no "evidence suggesting that the manner in which [Detective Martinez] engaged in small talk overbore [Delacruz's] free will." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 602 [distinguishing *Honeycutt*].) In addition, Delacruz was not initially reluctant to talk as was the defendant in *Honeycutt*; he was not acquainted with the interrogating officer as was the defendant in *Honeycutt*; he was not hostile to the interrogating officer as was the defendant in *Honeycutt*; and he did not agree to talk about the criminal investigation before he had been advised of his *Miranda* rights as did the defendant in *Honeycutt*.

Moreover, the defendant in *Honeycutt* was subject to two interrogation ploys to elicit the waiver: (1) the "Mutt and Jeff routine where one officer acts aggressively and hostile while a second officer, when alone with the suspect, seeks to gain his confidence by disapproving his partner's behavior"; and (2) "disparagement of the victim to induce in the defendant a feeling that his acts were justified." (*Honeycutt*, *supra*, 20 Cal.3d at p. 160, fn. 5.) Here, however, there was no Mutt and Jeff routine and Detective Martinez's brief, general statement regarding the Zarate's marital fidelity cannot be reasonably construed as suggesting that Zarate's killing was justified.

Honeycutt is therefore distinguishable.

We also observe that there is no evidence in the record to support defendant's proposition that the lengthy time Delacruz spent handcuffed in the interview room before the interview overbore his free will. (*Cf. People v. Gurule*, *supra*, 28 Cal.4th at p. 602.) The transcript from which we have recounted Detective Martinez's *pre-Miranda* remarks to Delacruz indicates that Delacruz was attentive, responsive, and engaging to those remarks.

And finally, inducements to speak the truth are not always, or necessarily, coercive. "The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' [Citation.] ... [¶] When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing

> benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear." (*People v. Hill* (1967) 66 Cal.2d 536, 549.) Here, Detective Martinez did not offer defendant any tangible benefit for speaking the truth. He implied no offer of lenient treatment by the police, prosecution, or court. At best, the exhortations to tell the truth are ambiguous. But the trial court was not required to make the inference that the exhortations implied the existence of a police promise of lenient treatment.
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> We agree with the trial court that Delacruz's waiver of his *Miranda* rights was knowing and voluntary. The subsequent interview was therefore admissible.

(Op. at 6–10).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that a person subjected to custodial interrogation must be advised that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Miranda*, 384 U.S. at 444. Once properly advised of his rights, an accused may waive them voluntarily, knowingly, and intelligently. *See id.* A valid waiver of *Miranda* rights depends upon the totality of the circumstances. *See United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir. 1986). The government must prove waiver by a preponderance of the evidence. *See Colorado v. Connelly*, 479 U.S. 157, 169 (1986). To satisfy its burden, the government must introduce sufficient evidence to establish that under the totality of the circumstances, the defendant was aware of "the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Although the burden is on the government to prove voluntariness, a waiver cannot be held involuntary absent official compulsion or coercion. *See Colorado*, 479 U.S. at 170 ("*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that."). The requirements of *Miranda* are "clearly established" federal law for purposes of federal habeas corpus review under 28 U.S.C. § 2254(d). *Juan H. v. Allen*, 408 F.3d 1262, 1271 (9th Cir. 2005).

Based on a review of the record and the applicable law, the Court finds that Petitioner fails to state a claim meriting habeas relief. Petitioner cannot demonstrate that the state appellate court's opinion was contrary to, or an unreasonable application of, the clearly established federal law. After evaluating the circumstances surrounding the interrogation and reviewing the pre- and post-*Miranda* conversation, the state appellate court found that there was no official – or unofficial – coercion or compulsion. (Op. at 9.) Federal law, as determined by the United States Supreme Court, requires that there be official compulsion or coercion to find a *Miranda* waiver involuntary. *See Colorado*, 479 U.S. at 170. Accordingly, the state appellate court's subsequent conclusion that Petitioner voluntarily waived his *Miranda* rights is not contrary to, or an unreasonable application of, clearly established federal law.

Nor was the state appellate court's opinion based on an unreasonable determination of the facts. The facts do not support a finding that Petitioner's will was overborne.[6] Petitioner was not initially reluctant to talk to the detective and he was not hostile to the detective. (Op. at 9.) The detective first advised Petitioner of his *Miranda* rights before asking him about the criminal investigation. (*Id.*) Petitioner was "attentive, responsive and engaging to [the detective's pre-*Miranda*] remarks," despite having waited in handcuffs for 15 hours prior to the interrogation. (*Id.*) The state appellate court also reasonably concluded that the detective's brief statement regarding the victim's marital fidelity could not reasonably be construed as suggesting that the victim's killing was justified. (*Id.*)

Petitioner's ability to withhold the truth from the police and change his story to benefit himself also imply that his will was not overborne. When Petitioner first spoke with the police, he lied. He claimed to barely know co-defendant Andrade (Answer Ex. 1 at 400–02 ,404); denied being Andrade's lover (*id.* at 431); claimed to be Rosa's boyfriend (*id.* at 400); and claimed to have no involvement in the murder (*id.* at 425–26,

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[6] Pursuant to 28 U.S.C. § 2244(e), the Court presumes that all determinations of factual issues made by the state court are correct. 28 U.S.C. § 2244(e).

429–30, 433, and 437–38.) After the detective confronted him with text messages, Petitioner changed his story. Even then, Petitioner claimed to have only driven the victim's car to the vineyard where the victim's body was discovered, on the instructions of an unidentified man. (*Id.* at 456–58.) Petitioner only confessed to the crime after the detective confronted him with evidence of his communication with Andrade and informed him that Andrade had already told the detective "everything." Even after Petitioner told the detective that he was guilty (*id.* at 461), Petitioner continued to lie and downplay his involvement in the crime. He claimed that he only intended to beat up the victim (*id.* at 463) and that he did not shoot him (*id.* at 465).

In addition, the record does not support Petitioner's contention that his serious kidney condition rendered him so desperate for a bathroom break that he would have agreed to anything. The detective brought up Petitioner's kidney condition and Petitioner informed the detective that although he had been in great pain the prior night and that morning, he was now feeling fine. (Answer Ex. 1 at 356–57). Also, there is no record of Petitioner asking the detective for a bathroom break. Based on the evidence presented at the state court proceeding, the state appellate court reasonably concluded that Petitioner voluntarily waived his *Miranda* rights.

Moreover, assuming there was error, it was not prejudicial. On federal habeas review, reversal is only warranted if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks and citation omitted); *see also Fry v. Pliler*, 551 U.S. 112, 120–22 (2007) (*Brecht* harmless error standard applies on collateral review by federal habeas court where state appellate court failed to recognize the error and did not review it for harmlessness). The Court finds that the *Miranda* violation in this case did not have a substantial and injurious effect or influence on the jury's verdict because the prosecutor presented weighty, if not overwhelming, evidence of Petitioner's guilt apart from Petitioner's confession. Text messages between Petitioner and Andrade proved that they were lovers. Petitioner was linked to the phone number used in the text messages

through his payment of a service bill for the phone. (Answer Ex. 3 at 780 (service bill) and Ex. 2 at 1925, 1929–31, and 250.) Petitioner also identified himself as the user of the phone on one text and responded to other texts addressed to Sergio. (Answer Ex. 3 at 771, 776). The text messages also proved that Petitioner and Andrade were planning to kill the victim and had made prior attempts to kill the victim on April 11, 2008, the day of the murder. On April 4, 2008, Andrade texted Petitioner about giving the victim a paste of pills so that the victim would be weak. (*Id.* at 773.) Petitioner responded: "give him a lot – that way I'll fuck that idiot for you." (*Id.*) In a subsequent text, Andrade worried about the victim learning that his gun was missing. (*Id.*) On April 7, 2008, Andrade asked Petitioner about a silencer. (*Id.* at 776.) On April 7, 2008, Andrade asked Petitioner if he had obtained chloroform. (*Id.* at 776.) On April 8, 2008, Petitioner reported that his accomplices were stopped by police but that he avoided being stopped because he was further behind his accomplices. (*Id.* at 777.) On the day of the murder, April 11, 2008, Petitioner texted Andrade that he had the pills and that she should go to the usual gas station: "This is the last opportunity." (*Id.* at 781.) She responded that she had picked up the pills and would give the pills to the victim. The text messages are overwhelming evidence of Petitioner's intent to murder the victim. In addition, circumstantial evidence supports the theory that Petitioner and Andrade were lovers and were hiding their relationship from the victim. Andrade's neighbor, Consuelo Gomez, testified that she saw Petitioner parked at Andrade's house prior to the day of the murder and that Andrade falsely introduced Petitioner has her cousin. The evidence of Petitioner's guilt, outside of the confession, was weighty and supports the Court's finding of harmless error. *See Brecht*, 507 U.S. at 639 (trial error was harmless where "the State's evidence of guilt was, if not overwhelming, certainly weighty"). Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

For the reasons set forth above, the petition for writ of habeas corpus is **DENIED**. Petitioner's request for counsel is **DENIED AS MOOT**. (Docket No. 10.)

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is **DENIED**.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: April 3, 2015

BETH LABSON FREEMAN
United States District Judge